NO. 89-1227 (3)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CSXT, INC.,
Petitioner,

vs.

JAMES J. PITZ, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN, NORMA J. FLEMING, ADMINISTRATOR OF THE RAILROAD SAFETY AND TARIFFS DIVISION OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN

and

UNITED TRANSPORTATION UNION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent United Transportation Union's Brief in Opposition

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Whether a Michigan Department of Transportation (MDOT) Rule requiring "adequate toilet facilities be made available", but which does not require toilets on locomotives textually or by agency or state court construction, provides the basis for a facially conclusive preemption challenge under the Locomotive Boiler Inspection Act, 45 USC 22 et seq. (LBIA), which only regulates locomotives and not the entire consist.

II.

Whether a State Rule requiring "adequate toilet facilities be made available" is facially preempted by the Federal Railroad Safety Act (FRSA) where the Secretary of Transportation has not prescribed rules directly governing locomotive toilets and the FRSA expressly allows states to adopt or continue in force any rule related to railroad safety until the Secretary has adopted a rule covering the subject matter.

III.

Whether this Court should use this case to determine if a facially conclusive preemption claim renders abstention inappropriate where CSXT does not have a facial claim of federal preemption, where the Court below did not directly address the question and where other lower courts have not directly addressed this issue, leaving this Court without the benefit of lower court decisions.

IV.

Whether the State administrative hearing at issue should be considered "judicial" in nature for purposes of *Younger* abstention where the hearing was to be held in accordance with Chapter 4 of the Michigan Administrative Procedures Act which provides, inter alia, for representation by counsel, the filing of pleadings, subpoenaing of witnesses and documents, direct and cross examination of witnesses, a decision by a neutral administrative law judge and judicial review in the state court system.

V.

Whether the Court should grant certiorari to a case which would require it to determine the merits of two arguments raised by UTU below which were not addressed by the Court of Appeals, i.e. (1) CSXT's claim should be dismissed because it failed to exhaust its administrative remedies, and (2) the District Court failed to seek a construction of the Rule which would avoid the constitutional challenge but instead impermissibly rendered an advisory opinion and improperly enjoined one possible construction.

LIST OF PARTIES AND RULE 28.1 LIST

The parties before the Court of Appeals and this Court are all listed in the caption.

United Transportation Union has the following parent companies, subsidiaries and affiliates: NONE

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CSXT, INC.,
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UNITED TRANSPORTATION UNION,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent United Transportation Union (UTU) respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's opinion in this case.

OPINIONS BELOW

Contrary to the representation of CSXT, the opinion of the Court of Appeals is reported, see 883 F.2d 468 (Appendix B). The opinion of the District Court is reported at 669 F. Supp 127 (Appendix D).

JURISDICTION

UTU accepts CSXT's jurisdiction statement.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED

UTU accepts listings 1 through 6 presented by CSXT. UTU denies the legal conclusion in No. 7 that the Michigan Department of Transportation (MDOT) lacks judicial power and affirmatively states that the administrative hearing at issue was "judicial" in nature. One additional statute addressing MDOT's powers is MICH. COMP. LAWS ANN. § 462.41, which provides in part as follows:

> "Upon the request of the commission [now MDOT] it shall be the duty of the attorney general, or the prosecuting attorney of the proper county, to aid in any investigation, prosecution, hearing, or trial had under the provisions of this act, and to institute and prosecute *all necessary actions or proceedings for the enforcement of this act and of all other laws of this state relating to common carriers*, and for the punishment of all violations thereof." (Emphasis added).

MICH. ADM. CODE RULE 460.1473 is set forth below in its entirety for ease of reference:

> "(1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.
>
> (2) All yard diesels shall have the floors cleaned and the windows washed at reasonable intervals.
>
> (3) All cabooses shall have the interior washed once each year. Road cabooses used on trains handling ore in open top equipment, and all yard and transfer cabooses, shall have the floors scrubbed or mopped once each month, if the crew using same request it.
>
> Windows on all cabooses shall be washed once a month, except in freezing weather.
>
> (4) When required by the season of the year,doors and windows of cabooses shall be equipped with adequate metal stripping. Similarly, when required by the season of the year,

cabooses shall be equipped with screen doors or screen panels, and windows on each side of each caboose shall be screened. Sliding screen windows, however, shall be deemed adequate.

(5) An adequate supply of cool, sanitary water, satisfactory for drinking purposes, shall be made available for the use of trainmen, enginemen and yardmen. Suitable sanitary containers, equipped with a faucet or other dispenser, shall be maintained on cabooses and locomotives, and individual drinking cups shall be furnished by the company.

(6) Every caboose used in any train in this state, regardless of service, shall be provided with a stove or other adequate means of heating. A sufficient amount of fuel for the trip or shift shall be made available.

(7) Baggage and express cars, when occupied by employees coming under the provisions of this act, will be so arranged in the train that employees required to ride such cars will have access to the drinking water, toilet and washing facilities provided in a coach in said train and, if it is found impractical to so arrange said cars in the train, then drinking water, toilet and washing facilities must be furnished for the employees riding said cars upon formal order of and by the commission.

STATEMENT OF THE CASE

UTU is unable to accept CSXT's statement of the case. UTU refers the Court to the statement of facts presented in the Court of Appeals and District Court opinions.

UTU must also point out that the contested Rule does not textually require installing toilets on locomotives and that it has never been authoritatively construed by MDOT to so require. CSXT's statement of the case fails to note that UTU has suggested alternative constructions.

CSXT has stated that two-thirds of its locomotives are already equipped with toilets. As UTU pointed out to the Courts below, the Rule could be complied with by using nonequipped locomotives on any consist (road train) where either another equipped locomotive is present or where an equipped passenger car or an equipped caboose is part of the same consist. Since most train consists include more than one locomotive, and since only one locomotive in the consist must be equipped, one of the unequipped locomotives could be

used on most consists in Michigan. Nonequipped locomotives also may be used in the yard areas since adequate facilities are usually available in the yard area. CSXT's Appendix G-6 recognizes this.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' observation that the LBIA does not prohibit concurrent state regulation or purport to occupy the field of railroad regulation was: (1) accurate, (2) does not conflict with prior rulings of this or other Courts, and (3) was superfluous to its holding that *Younger* abstention was appropriate.

The first argument raised by CSXT inaccurately portrays the decision of the Court of Appeals. CSXT claims that a comment made by the Court of Appeals in a paragraph providing background to the dispute was a holding that contradicted other Court decisions.

The complained of observation was not, however, a "holding" of the Court of Appeals. The complained of language was mere dicta and not necessary to the Court of Appeals' finding that *Younger* abstention was appropriate.

The background comment about which CSXT complains is where the Court said the LBIA:

> "lists certain equipment required for locomotives and railroad cars ... does not prohibit concurrent state regulation or purport to occupy the field of railroad [regulation]*." (App. B, p. B-4).
>
> *Misprinted in the text of the opinion as "negotiation".

This statement is in fact correct as far as it goes. CSXT is improperly reading the phrase "railroad regulation" to mean "locomotive regulation". These two phrases are, however, quite different. This Court held in *Napier* v *Atlantic Coastline*, 272 U.S. 605, 47 S. Ct. 207, 71 L.Ed. 432 (1926) that the LBIA occupied the field of locomotive equipment. The Court of Appeals did not deny this. The Court of Appeals merely said that the LBIA does not occupy the field of railroad regulation. Railroad regulation covers a much broader category than that of locomotives. This was recently recognized by the Fifth Circuit when it held in *Missouri Pacific Railroad Co.* v *Railroad Commission of Texas*, (MOPAC I), 833

F.2d 570, 576 (CA 5, 1987) that cabooses are not within the purview of the LBIA. The Court upheld a state rule requiring fire extinguishers and first-aid kits on cabooses and rejected an LBIA preemption claim. The LBIA would thus not preempt a state rule requiring toilets on cabooses or roadcars, which would be consistent with the disputed Rule's text.

The cases cited by CSXT which supposedly conflict with the observation of the Court of Appeals all specifically address regulation of locomotives and, therefore, are not in conflict with the Court of Appeals' statement that the LBIA does not occupy the field of railroad regulation. Railroad regulation encompasses the entire consist, roadcars, cabooses, railroad tracks, etc. and not only locomotives.

CSXT's argument is also erroneous in that it seems to assume that the Court of Appeals found the Rule was not preempted by the LBIA. A careful reading of the Court of Appeals' decision shows this is not the case. The Court of Appeals held that abstention was appropriate and then noted that the State Court system had jurisdiction to, and was capable of, resolving CSXT's constitutional claims.

The Court of Appeals' statement that the LBIA does not occupy the field of railroad regulation was in fact correct, does not conflict with any of the cases cited by CSXT and was unrelated to and did not affect its holding that *Younger* abstention was appropriate. The statement, therefore, does not provide a basis for granting certiorari. CSXT is still free to argue in the State Court system that the Rule is preempted by the LBIA.

II. A facial preemption claim is not presented where the Rule merely requires "adequate toilet facilities be made available", where the Secretary of Transportation has not prescribed rules covering locomotive toilets, and where the Federal Railroad Safety Act, 45 USC 421 et seq. (FRSA) allows state rules until the Secretary adopts a rule covering the subject matter.

CSXT complains that the Court of Appeals rendered a conflicting decision concerning the FRSA. This argument is incorrect in that the complained of language was not a "holding" of the Court but merely dicta found in a background paragraph. The complained of language is in fact correct and did not provide a basis for the Court's holding that *Younger* abstention was appropriate.

The comment about which CSXT complains is where the Court said the FRSA allows the Secretary of Transportation to:

> "prescribe appropriate rules for all areas of railroad safety," including rules concerning equipment and operating procedures. (Citing FRSA § 431 (a)). The Act allows limited concurrent state regulation.[3] (App B, p. B-4).

CSXT objects to the statement that the FRSA allows limited concurrent state regulation. The footnote at the end of the complained of language refers the reader to 45 USC § 434, the statute which sets forth the two instances when the FRSA does allow limited concurrent state regulation. The statement of the Court of Appeals was correct and is not in conflict with any court decisions.

The Sixth Circuit made an accurate statement, i.e., limited concurrent state regulation is allowed. CSXT has not cited any cases which state that § 434 of the FRSA is not the law. It would indeed be unusual to find a conflict here since the Court was merely summarizing a statute.

CSXT's discussion of how "cover the subject matter" should be construed is irrelevant to the instant petition because the Court of Appeals did not even address this issue. The Court's decision does not foreclose CSXT from arguing in favor of FRSA preemption in the state court proceedings.

The disputed MDOT rule is not facially preempted by the FRSA. The Rule textually requires "adequate toilet facilities be made available." The Court of Appeals correctly stated on page 5 of its opinion that the Secretary has not prescribed rules directly governing locomotive toilets. The District Court stated that "locomotive commodes do not appear as specific regulated items", see Appendix D-5. These statements fully demonstrate that the disputed MDOT Rule is not "facially" preempted by the FRSA. A fair argument exists concerning how "covers the subject matter" should be construed and, therefore, the Rule may be valid as the Secretary has not adopted a rule covering toilets. A facial preemption claim thus simply does not exist.

The alleged conflict does not exist. The complained of statement is irrelevant to the Court of Appeals' holding that *Younger* abstention was appropriate. The complained of statement was dicta and in fact quite accurate.

III. This is not an appropriate case to determine if a facially conclusive preemption claim renders abstention inappropriate because CSXT's claim is not facial, only substantial, the lower court did not directly address the issue and other courts have not yet directly addressed the issue.

CSXT claims that the Sixth Circuit held that *Younger* abstention is appropriate in facially conclusive preemption claims. This is an incorrect assessment of the Court's decision.

In *New Orleans Public Service, Inc.* v *Council of City of New Orleans (NOPSI)*, 491 U.S. _____, 109 S. Ct. 2506, 105 L.Ed.2d 298 (1989), this Court rejected an argument that *Younger* does not require abstention in the face of a substantial preemption claim. This Court said it disagreed with such a contention. Thereafter, in dicta, this Court said that perhaps a facially conclusive (in contrast with a substantial claim) preemption claim would render *Younger* abstention inappropriate.

The Court of Appeals did not, however, acknowledge the possible distinction between a facially conclusive and a substantial preemption claim suggested by the dicta in *NOPSI*. The Court of Appeals relied on this Court's direct rejection of the claim that *Younger* abstention is foreclosed due to a substantial preemption claim. The Court of Appeals stated:

> "We do not see any reason to analyze abstention cases involving a preemption claim differently than other abstention cases." (App. B, p. B-9).

Thus, the Sixth Circuit did not directly address whether *Younger* abstention is appropriate when a facially conclusive preemption claim is presented. CSXT cannot argue that the Court of Appeals decided this issue. CSXT even states on pages 11-12 of its petition that the Court of Appeals did not acknowledge that *NOPSI* distinguished between "substantial" preemption claims and "facially conclusive" preemption claims. Thus, the very issue framed by CSXT is not supported by the Sixth Circuit's decision. The Court of Appeals' decision does not purport to answer the question left open by the *NOPSI* Court's dicta.

This case is not an appropriate vehicle to determine if *Younger* abstention is inappropriate when a federal Court is faced with a facially conclusive preemption claim because CSXT's claim is not facially

conclusive and because this issue has not yet had a chance to percolate through the lower courts.

A. CSXT's preemption claim is not facially conclusive.

The disputed Rule requires that "adequate toilet facilities" be made available for trainmen, enginemen, and yardmen. The Rule never mentions the word locomotive and does not use the word installation. CSXT's entire preemption claim is premised on a construction of the Rule which would require the installation of toilets on its presently non-equipped locomotives. CSXT claims that MDOT interprets the Rule to require installation of toilets on its locomotives. It is true that the assistant attorney general representing the enforcement division of MDOT has advocated this construction in the preliminary stages of this proceeding. This, however, is not the same thing as a definitive construction of the Rule by the agency itself.

This is clearly set forth in *Attorney General* v *Michigan Public Service Commission*, 412 Mich 385, 420; 316 NW2d 187 (1982), where the Michigan Supreme Court said:

"While lawyers often make concessions binding on their clients in particular litigation, *the views of a lawyer representing a regulatory commission should not be accepted by this Court as an authoritative construction by an agency charged with the administration of an act. The authoritative statement of the views of the commission regarding its concept of the meaning of the utility securities act is to be found in its decisions and opinions.*" (emphasis added).

This language is applicable to the Rule before this Court. This disputed Rule has not been construed by an MDOT administrative law judge or by the Transportation Commission itself. No agency decisions or opinions exist which provide the agency's interpretation of the Rule.

UTU believes that requiring toilets on all locomotives is one way to enforce the Rule. This, however, is a long way from saying that it is the only way to comply with the Rule. The Rule textually does not require the installation of toilets on locomotives. In fact, a review of all seven subsections of the rule demonstrates that the rulemakers were not averse to prescribing rules for particular train cars. For example, the seven subsections of the Rule list the following train cars: yard diesels, road cabooses, yard cabooses, transfer cabooses,

locomotives, baggage cars, express cars and coaches. Specific requirements are set forth for these listed train cars. No particular cars are listed in the first subsection of the Rule, which is the portion of the Rule disputed herein. The thrust of the first subsection is availability of toilet facilities to trainworkers and not on which train car such facilities must be made available. The failure to use the word locomotive in the first subsection,when it is used in the fifth subsection, shows a lack of intent to impose a specific requirement upon locomotives as the only way with which the rule may be complied. Therefore, it cannot fairly be said that a facial preemption claim exists.

In *NOPSI*, this Court analyzed whether a facial preemption claim existed. The Court said:

> But we cannot conclusively say it is wrong without further factual inquiry — and what requires further factual inquiry can hardly be deemed "flagrantly" unlawful for purposes of a threshold abstention determination. (*NOPSI*, 491 U.S. ____, 109 S. Ct. at 2517).

Thus, further inquiry negated a claim of facial preemption. The text of the disputed Rule, which has never been authoritatively construed, cannot be deemed flagrantly in violation of the LBIA or FRSA. The Rule on its face cannot be said to be plainly invalid. One must look beyond the face of the Rule to find preemption.

B. The issue has not percolated through the lower courts.

Even if the disputed Rule textually required the installation of toilets on locomotives (which it does not), this would not be an appropriate case to determine if *Younger* abstention is inapplicable to facially conclusive preemption claims.

The possibility that facially conclusive preemption claims may not be subject to *Younger* abstention was raised for the first time in dicta by this Court in its June 19, 1989 decision in *NOPSI*. The Sixth Circuit's opinion did not directly address this issue. CSXT has not cited any other lower court decisions which have attempted to answer this question. Given the recent origin of this possible distinction, this Court would be well advised to let the lower courts grapple with the issue. This will allow the competing policy issues and legal theories to be applied in a variety of factual situations. Once these have been considered in the lower courts, a consensus may be reached

or at least competing legal theories may be presented from which this Court may choose. It would be premature for this Court to seek to resolve this question without the benefit of lower court decisions. There can be no question that this issue is deserving of a thorough airing in the lower courts before this Court attempts to resolve it.

The above reasoning also applies to CSXT's suggestion that this Court should clarify that *Public Utilities Commission of Ohio* v *United Fuel Gas*, 317 U.S. 456, 63 S. Ct. 369, 87 L.Ed. 396 (1943) survives *Younger* v *Harris*, 410 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), and *Ohio Civil Rights Commission* v *Dayton Christian Schools*, 477 U.S. 619, 106 S. Ct. 2718, 92 L.Ed.2d 1 (1986). Once again, this is a question the Sixth Circuit did not address, and CSXT has not cited any Court opinion that has addressed this issue. Moreover, it is not clear that any clarification is necessary. *United Fuel Gas* invalidated orders that were plainly invalid on their face. *Younger* allows invalidation of a statute that is flagrantly and patently unconstitutional.

The Court also should recognize that CSXT's statement on page 14 of its petition that *United Fuel Gas* refused to apply abstention to a facially conclusive claim neglects to mention that it was *Pullman* abstention which was not applied, *Railroad Commission* v *Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941). *Younger* was not decided until 1971.

UTU further refers the Court to the decision of the Sixth Circuit, which demonstrates that no good reason exists to analyze abstention cases involving a preemption claim differently from other abstention cases.

IV. The Court of Appeals' decision that the MDOT administrative proceeding was "judicial" in nature was correct and not in conflict with any decisions of this Court or the Michigan Supreme Court.

CSXT contends that the administrative hearing at issue was not "judicial" in nature and, therefore, *Younger* abstention was inappropriate.

Pages 9-12 of CSXT's Appendix G reproduce the notice of hearing issued by the administrative law judge. The notice indicates that the contemplated hearing was to be conducted in accordance with, inter alia, 1969 PA 306 Ch 4, i.e., Chapter 4 of the Michigan

Administrative Procedures Act, MICH. COMP LAWS ANN. § 24.271-287 (pertinent parts reproduced verbatim in Appendix E).

These statutes provide for a contested hearing containing all the hallmarks of a hearing which are "judicial" in nature. These statutes provide for the following:

1. Representation by counsel.
2. The filing of pleadings.
3. Subpoenaing of witnesses and documents.
4. Direct and cross examination of witnesses.
5. A decision by a neutral administrative law judge (presiding officer).
6. A decision by the agency.

All of the above listed procedures fully indicate that the administrative hearing at issue was "judicial" in nature.

Further guidance is provided by *NOPSI*. Therein the Court explained that an agency's proceedings are characterized as judicial or legislative depending on the "nature of the final act" which it is designed to produce. *NOPSI*, 109 S. Ct. at 2519. *NOPSI* cited with approval the following language from *Prentis* v *Atlantic Coast Line Inc.*, 211 U.S. 210, 226, 20 S. Ct. 67, 53 L.Ed. 150 (1908), where the Court said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new result to be applied thereafter to all or some part of those subject to its power."

The hearing at issue was to investigate and determine if CSXT had violated a state Rule in the past and therefore can only be characterized as "judicial" in nature.

In *Middlesex County Ethics Comm* v *Garden State Bar Association*, 457 U.S. 423, 433-434, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1982), and in *Ohio Civil Rights Commission* v *Dayton Christian Schools, Inc.*, 477 U.S. 619; 106 S. Ct. 2718; 92 L.Ed.2d 1 (1986), the court found state administrative hearings to be "judicial" in nature.

CSXT's reference to the Michigan Constitutional provision that requires separation of powers is inapplicable, Mich. Const. Art III § 2. In Michigan, an agency may exercise quasi-judicial powers notwithstanding the separation of powers provision of the Michigan Constitution. Were this not true, all of Chapter 4 of the Michigan Administrative Procedures Act would be unconstitutional. MDOT was to be exercising quasi-judicial power when it held the contested case hearing, and this is sufficient to constitute a proceeding that is "judicial" in nature.

CSXT next contends that the administrative hearing was not "judicial" in nature because MDOT was acting as both the "adversary and decisionmaker".

MDOT is a large state agency with many divisions. A complaint was filed by UTU alleging that CSXT had violated a Rule. MDOT's enforcement division investigated the claim. Upon a determination that the complaint merited further review, a hearing was scheduled. The hearing was to be held by an impartial administrative law judge. The enforcement division was to be represented by an assistant attorney general. CSXT was allowed to have its own counsel. The administrative law judge was to determine if the Rule had been violated. The agency thereafter would issue a final order. If still aggrieved, CSXT could seek judicial review through the State Court system.

The claim that MDOT was both adversary and decisionmaker is thus without merit. In reality, the hearing was similar to a criminal prosecution in that a party files a complaint, a prosecutor authorizes the filing of charges and thereafter a trial is held before a judge. Under CSXT's convoluted reasoning, the State is the adversary and decisionmaker in criminal proceedings; after all, the police, prosecutor, and judge all work for the government. In *Withrow* v *Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975), the Court stated that it was permissible for a judge to preside at a bench trial over a defendant even where the same judge had previously authorized an arrest warrant because probable cause existed to believe a crime had been committed.

CSXT states that the essence of a judicial proceeding is a neutral forum. The Michigan Administrative Procedures Act meets this concern by requiring that administrative hearings be conducted in an impartial manner before an unbiased officer, MICH. COMP. LAWS ANN. § 24.279.

The Court of Appeals' decision that the Michigan administrative proceeding at issue was "judicial" in nature was clearly correct and not in conflict with any Court holdings.

V. The Court should not grant certiorari to this case because grounds not considered below exist which this court would also have to accept if certiorari is granted.

UTU raised several grounds for reversal in its appeal before the Sixth Circuit. That Court only addressed one of the issues raised, i.e., *Younger* abstention. The Court did not address other arguments UTU had presented. These other meritorious issues would have to be evaluated by this Court if it were to grant certiorari. Having to rule on these issues without having the benefit of a decision from the Court of Appeals to review militates against granting CSXT's petition.

A. CSXT Failed to Exhaust its Administrative Remedies

UTU argued before the District Court and Court of Appeals that CSXT was not entitled to any relief in federal court because it had not exhausted its administrative remedies. If certiorari is granted, this Court will have to address the merits of this contention without having the benefit of a ruling from the District Court or Court of Appeals on the issue.

The doctrine of exhausting administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted, *Myers* v *Bethleham Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L.Ed. 638 (1938). CSXT failed to exhaust its administrative remedies in that it did not participate in the scheduled contested hearing or thereafter appeal any order entered against it. At the time CSXT filed suit, MDOT had not ordered CSXT to do anything.

Exhaustion is warranted when the matter involves an unsettled question of law or when the agency could resolve the matter on non-constitutional grounds. *Aircraft & Diesel Equipment Corp.* v *Hirsch*, 331 U.S. 752, 67 S. Ct. 1493, 91 L.Ed. 1767 (1947).

The Sixth Circuit stated on page 7 of its opinion that "it is not prudent for courts to interfere in the regulatory process before the facts are sorted out and the regulatory *rule is defined and applied*"

(emphasis added). The Rule at issue has not been defined or applied by the state administrative law judge or the Transportation Commission on review of the administrative law judge's decision. UTU had made clear that CSXT's challenge to the Rule could have been resolved by the agency on nonconstitutional grounds. This Court carefully noted in *United Fuel Gas* that the federal court plaintiff had exhausted its administrative remedies prior to seeking an injunction in federal court, 317 U.S. at 470.

The Rule textually only requires availability, not installation of toilets on locomotives. Two-thirds of CSXT's locomotives have toilets already installed on them. In light of the fact that almost all consists have two or more locomotives on them, the problem for CSXT could be considered one of dispatching and not installation. See page 6 of CSXT's exhibit G which acknowledges this. It is apparent that CSXT jumped the gun. MDOT had not authoritatively construed the Rule. MDOT had not entered a cease and desist order. MDOT was never given the chance to construe the Rule. If MDOT had entered an order forbidding CSXT from running consists in Michigan without having one equipped locomotive or some other equipped car, then CSXT would not be required to install any toilets. Other rulings MDOT could have made short of ordering the installation of toilets demonstrate the reason the District Court's opinion was premature, advisory and totally unwarranted. The express policy reasons which gave rise to the holding of *Hirsch* are present in the case before the Court.

B. The District Court ignored its duty to give the rule a limiting construction which would save it from the perceived preemption but instead improperly enjoined one possible construction of the Rule.

Statutes (and administrative rules) are to be presumed constitutional, *Fleming* v *Nestor*, 363 U.S. 603, 617, 80 S. Ct. 1367, 4 L.Ed.2d 1435 (1960). It is a cardinal principle that Courts are to seek statutory constructions which avoid constitutional doubts, *Johnson* v *Robinson*, 415 U.S. 361, 366-367, 94 S. Ct. 1160, 39 L.Ed.2d 389 (1974). A state statute which has not been authoritatively construed by a state court should be construed in a manner that will avoid constitutional questions, *New York* v *Ferber*, 458 U.S. 747, 102 S. Ct. 3348; 73 L.Ed.2d 1113 (1982).

The District Court failed to pay homage to or to obey either of these admonitions. The disputed Rule has never been authoritatively construed by the Transportation Commission, an MDOT administrative law judge or a state court. The District Court put the cart before the horse by advising that one construction was preempted instead of abstaining so the agency or state court could construe the Rule. At a minimum, the District Court should have given the Rule a limiting construction. The Court in *Moore* v *Sims*, 442 U.S. 415, 429-430, 99 S. Ct. 2371, 60 L.Ed.2d 994 (1979) stated that *Younger* abstention:

> "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests".

This language fully supports the Court of Appeals' decision to require abstention.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, respondent United Transportation Union submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

William Reid Ralls—
Counsel of Record
Leland R. Rosier
Bruce H. Edwards
118 West Ottawa Street
Lansing, Michigan 48933
(517) 372-6622

Dated: February 23, 1990

APPENDIX A

BEST AVAILABLE COPY

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 88-1629

CSXT, INC, a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ and NORMA J. FLEMING, in their official capacities;
DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN,
Defendants-Appellants (88-1642),

THE UNITED TRANSPORTATION UNION,
Intervening Defendant-Appellant (88-1629).

Before: MERRITT and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby vacated and the case is remanded with instructions to dismiss.

IT IS FURTHER ORDERED that Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF
THE COURT
Leonard Green, Clerk

/s/ LEONARD GREEN
Clerk

A True Copy.

Attest:

/s/ TOM BENNIGNUS
Deputy Clerk

Issued as Mandate: October 12, 1989

COSTS: APPELLANT TO RECOVER

Filing Fee ..... $
Printing $176.00
Total..... $

APPENDIX B

BEST AVAILABLE COPY

Nos. 88-1629; 88-1642

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, NORMA J. FLEMING, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan, and the DEPARTMENT OF TRANSPORTATION OF THE STATE OF MICHIGAN,
Defendants-Appellants (88-1642),

and

THE UNITED TRANSPORTATION UNION,
Intervening Defendant-Appellant (88-1629).

ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed August 22, 1989

Before: MERRITT and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

MERRITT, Circuit Judge. The defendants, James J. Pitz, Norma J. Fleming and Michigan Department of Transportation, and the intervening defendant, United Transportation Union, appeal on abstention grounds a District Court injunction restraining the Department from enforcing any state administrative action or rule requiring toilets in railroad locomotives. The injunction was issued on grounds that such a Michigan rule would be preempted by the Locomotive

Boiler Inspection Act, 45 U.S.C. §§ 22-43 (1976) and the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1976). The District Court held that the preemption doctrine prohibits the state agency from conducting the contemplated proceeding.[1] The central problem raised by the appeal is whether abstention is appropriate in preemption cases. We conclude under the circumstances of this case that abstention is appropriate; and we, therefore, reverse the order of the District Court. *CSXT, Inc. v. Pitz*, 699 F.Supp. 127 (W.D. Mich. 1988).

I.

The facts are not in dispute. The plaintiff, CSXT, is an interstate railroad system operating in Michigan. About one-third of CSXT's locomotives are not equipped with toilets. The defendant, Michigan Department of Transportation, has a general rule requiring that all railroads have "adequate toilet facilities" for the health of their employees. Mich. Adm. Code Rule 460.1473(a).[2]

The intervening defendant-appellant, United Transportation Union, is an international union representing CSXT train crews working in Michigan. After receiving reports that crew members were being asked to work on CSXT locomotives that did not provide toilet facilities, the Union

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[1] The language of the District Court's injunction is as follows:

> In accordance with the accompanying opinion, this Court grants plaintiff's motion for summary judgment, declares that the LBIA and the FRSA each preempts Rule 460.1473(a), insofar as it is construed to require commodes on locomotives operating in Michigan, and enjoins MDOT from so construing and enforcing the rule.

[2] Rule 460.1473(a) provides in pertinent part:

> Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order of the commission, which toilet facilities shall be kept in a reasonably clean and sanitary condition.

filed a complaint with the Michigan Department of Transportation. The complaint charged CSXT with violating the Michigan rule requiring railroads to have "adequate toilet facilities."

The agency scheduled a hearing before an administrative law judge after CSXT had filed a motion to stay the administrative proceedings. CSXT then filed a suit for injunctive and declaratory relief in federal court. After a hearing, the ALJ denied CSXT's motion for stay. She stated that she doubted that the agency had the authority to entertain the constitutional claims but cited Michigan authority holding that although Michigan administrative agencies ordinarily do not entertain constitutional claims, such claims may be raised in court on review of the agency's decision. Joint Appendix at 107. Additionally, the ALJ said that the sanitary regulations at issue were well within the police powers of the state. She refused to hold that the federal statutes relied upon by CSXT were intended "to prohibit state regulation in an area so basic to public health." *Id.* at 108.

The federal District Court granted the Union's motion to intervene on February 4, 1988, and on the same date entered a preliminary injunction restraining the state agency from enforcing its rule and restraining the agency from conducting the scheduled administrative proceedings until the District Court ruled on CSXT's motion for summary judgment. On February 10, 1988, the Union filed a motion to abstain. The District Court did not expressly consider or rule on the Union's abstention motion. The court found the state rule as applied to locomotives to be preempted by federal law and, therefore, without oral argument granted CSXT's summary judgment motion and issued a permanent injunction.

This appeal requires us to answer two questions. First, does the fact that this case raises preemption rather than other types of constitutional issues require us to modify the classic abstention analysis? And second, once the proper

mode of analysis is determined, does it require abstention in this case?

II.

The first question presented is whether the fact that this case is a preemption case, rather than another type of federal question case, should alter the way in which we view the abstention question. We conclude that it should not.

Two federal statutes are claimed to preempt the Michigan regulation. The Federal Boiler Inspection Act, 45 U.S.C. §§ 22-43 (1976), first adopted in 1911, lists certain equipment required for locomotives and railroad cars. Enforcement of the act is by civil penalty ("not less than $250 and not more than $2500") assessed by the Secretary of Transporation, which may be collected by suit in federal court. *Id.* at § 34. The Act does not prohibit concurrent state regulation or purport to occupy the field of railroad negotiation. The Railroad Safety Act, 45 U.S.C. §§ 421-44 (1976), adopted in 1970, is broader. It allows the Secretary to "prescribe . . . appropriate rules . . . for all areas of railroad safety," including rules concerning equipment and operating procedures. *Id.* at § 431(a). The Act allows limited concurrent state regulation.[3] The Act also provides for a similar but more elaborate system of enforcement through the

[3] The Act states:

> The Congress declares that laws . . . relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law . . . relating to railroad safety *until such time as the Secretary has adopted a rule . . . covering the subject matter of such State requirement.* A State may adopt or continue in force an additional or more stringent law . . . relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law . . . and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (1976)(emphasis added).

assessment and collection of civil penalties. *Id.* at § 436. The Secretary has not prescribed rules directly governing locomotive toilets, but CSXT argues that the Secretary has adopted general rules "covering the subject matter" and, therefore, has preempted Michigan law.

The Supreme Court in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, ____ U.S. ____, 109 S.Ct. 2506 (1989) (holding federal abstention not appropriate in favor of state administrative proceedings which are legislative in character), *reversing* 798 F.2d 858 (5th Cir. 1986), has recently rejected the argument that the presence of a preemption question bars a court from applying *Younger* abstention. The Court rejected NOPSI's contention that a district court presented with a preemption-based request for equitable relief was *a priori* divested of its power to abstain.[4]

The recent ruling in *NOPSI* casts doubt on the holding of the Eighth Circuit in *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404, 417 (8th Cir. 1985). There the Eighth Circuit declined to abstain in a nuclear power case in which it found that the Arkansas Public Service Commission was interfering with the jurisdiction of the Federal Energy Regulatory Commission. The state agency threatened to hold illegal certain purchase contracts between a large, multi-state, electric utility and its Arkansas subsidiary. The Arkansas agency apparently wanted to deter the state subsidiary from taking nuclear power from the parent, and the court suggested that such a state decision would have a serious effect on the parent's construction of

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[4] [O]ne of the issues in the present case is whether the principle of *Younger* can properly be extended to this type of suit. NOPSI argues that *Younger* does not require abstention in the face of a substantial claim that the challenged state action is completely pre-empted by federal law.... We disagree.

NOPSI, 109 S.Ct. at 2516.

a multi-billion dollar nuclear power plant. The basis of the Court's abstention ruling is not entirely clear, but it appears that the Court declined to abstain because it considered *federal regulatory jurisdiction* over the power contracts in question to be exclusively vested in the federal power agency. The Eighth Circuit did not discuss whether it considered the *federal court's jurisdiction* over the preemption issue to be exclusive or concurrent with the state court's.

The abstention issue in preemption cases should not turn on a determination concerning the location of exclusive regulatory jurisdiction in a federal or state agency. The state-federal regulatory jurisdictional issue usually turns, in one form or another, on whether the activity in question is characterized as intrastate or interstate. *See, e.g.*, Federal Power Act, 16 U.S.C. § 824(b)(1)(1976)(distinction stated as "transmission of electrical energy in interstate commerce" or "the sale of electrical energy at wholesale" versus "local distribution" or "the transmission of eletrical energy in intrastate commerce"). Under such statutes, the regulatory jurisdiction is exclusively state if the activity is intrastate, and exclusively federal if interstate. Such determinations of regulatory jurisdiction are often highly fact-specific and address themselves in the first instance to the expertise of the administrative agencies charged with economic regulation of the particular industry. In such cases both Congress and the state legislature have delegated frontline authority to find facts and devise economic regulations to administrative bodies with specialized knowledge of the industries to be regulated. Ordinarily, it is not prudent for courts to interfere in the regulatory process before the facts are sorted out and the regulatory rule is defined and applied.

In the present case there is no grant of exclusive jurisdiction to federal courts to resolve federal railroad safety questions or preemption claims in this area of the law. State courts do not lack jurisdiction over railroad safety issues or preemption claims. State courts normally have concurrent

jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79 (1981); *Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1282-86 (6th Cir. 1988).

Other policies support our holding that abstention cases involving preemption should not be treated differently than other abstention cases. We reject the oft-repeated assertion that the federal courts have "unique expertise" in adjudicating preemption claims because they are "comparatively more skilled at interpreting and applying federal law and are much more likely to correctly ascertain congressional intent." Note, *The Preemption Dimension of Abstention*, 89 Colum.L.Rev. 310, 322-23 (1989). State judges are not inferior to federal judges. They have the ability to interpret federal statutes, however complex. Though preemption is a constitutional issue, it is not of a differrent order of magnitude than due process, first amendment and other constitutional issues which often arise during the course of a state or federal administrative and judicial proceeding. To hold that a state court may decide federal constitutional issues generally but should not decide preemption issues makes little sense.

State courts frequently decide such issues. It may be argued that state judges are somewhat more inclined to read state regulatory jurisdiction more broadly than federal judges. Compare *Michigan Gas Storage Co. v. Michigan Public Service Comm'n*, 405 Mich. 376, 275 N.W.2d 457 (1979), in which the Michigan Supreme Court, after extensive analysis of the federal Natural Gas Act, concluded that the Act does not preempt state regulation of the securities of gas companies, with *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986), *aff'd*, 108 S. Ct. 1145 (1988), reaching the opposite result. But see *Natural Gas Pipeline Co. v. Illinois Commerce Comm'n*, 33 Ill.2d 214, 210 N.E.2d 490 (1965), in which the Illinois Supreme Court held Illinois regulation of natural gas securities preempted by the Natural

Gas Act. Even if it were true that state judges were less inclined to displace state regulatory jurisdiction than federal judges, this tendency is not a sufficient reason to modify the doctrine of abstention by substituting federal for state judges in cases raising preemption issues.

The Tennessee Court of Appeals recently decided a preemption issue under the Federal Railroad Safety Act similar to the one raised in the present case. The issue was whether the federal Act preempts state administrative proceedings enforcing a requirement concerning the construction of "walkways" in railroad switching yards. Judge Cantrell, after extensive analysis of the issue, concluded that Tennessee's walkways rule was not covered by a federal rule on the same subject matter and, therefore, was not preempted. *Illinois Central Gulf Ry. Co. v. Tennessee Public Service Comm'n*, 736 S.W.2d 112, 115 (Tenn.App. 1987).

In fact, state courts are often in a better position to decide preemption issues because they would do so on review of an administrative decision finding the facts. The threshold determination of whether jurisdiction over an activity is exclusively federal or state or is concurrent is often highly fact-specific and often requires the specialized knowledge of the state administrative agency to which regulation of the activity has been delegated.

Moreover, even if we accepted the proposition that some state courts lacked the necessary expertise, the resulting harm—that a case could be decided incorrectly by a state court and be denied certiorari by the United States Supreme Court so that federal-court review of the incorrectly decided constitutional claim was precluded—is no greater than it is when a federal court incorrectly decides a case, and the United States Supreme Court declines review. If the federal decision to abstain and the state decision to assert jurisdiction were inappropriate, it may be that the doctrine of res judicata should not apply in full force to the state court

judgment. *See Key v. Wise*, 454 U.S. 1103 (1981)(Brennan, J., dissenting from denial of *certiorari*).

In summary, we do not see any reason to analyze abstention cases involving a preemption claim differently than other abstention cases. In particular, we do not agree that the decisive abstention question in preemption cases arising from pending state administrative proceedings is whether the *regulatory authority* over the particular activity in question is exclusively federal or exclusively state. A federal court need ask itself only two questions: whether the state court has concurrent judicial jurisdiction to decide the preemption question, and, if the answer to that question is "Yes," whether a federal court should abstain in favor of ongoing state proceedings originating in the state regulatory agency. There is no question in the present case that concurrent *judicial* jurisdiction exists. We, therefore, proceed to inquire whether abstention is appropriate.

III.

Abstention pursuant to the judicially-crafted rule announced in *Younger v. Harris*, 401 U.S. 37 (1971), is appropriate only where a court can answer all three of the following questions in the affirmative:

> [F]irst, do [the relevant state proceedings] . . . constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). In the present case we answer affirmatively all three questions.

Is the administrative proceeding here an "ongoing state judicial proceeding?" *Middlesex*, 457 U.S. at 432. Under the Supreme Court's recent analysis is *NOPSI*, it clearly is. There the Court explained that an agency's proceeding will

be characterized as judicial or legislative depending on the "nature of the final act" which it is designed to produce. *NOPSI*, 109 S.Ct. at 2519 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908)(Holmes, J.)). Where the proceeding "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," it is judicial. *Id.* at 2520 (quoting *Prentis*, 211 U.S. at 226). We are faced with an administrative proceeding before the Michigan Department of Transportation in which the interpretation and application of a state rule requiring "adequate toilet facilities" are in question and in which the final result will be a determination whether CSXT is liable for a violation of this established rule. There is, thus, an ongoing state proceeding that is judicial in nature, and we must acknowledge that it implicates all the comity concerns that motivate the *Younger* doctrine.

The third requirement—of an "adequate opportunity" to raise the issue—is also met, even though the state administrative agency may have no power to hear CSXT's constitutional claim, because Michigan law supplies full judicial review of this agency proceeding. The Michigan Administrative Procedures Act, Mich. Comp. Laws § 24.301, provides for review of such proceedings, and the Michigan courts will entertain the federal question on review. *See Michigan Gas Storage Co., supra* (reviewing preemption issues); *Blue Cross and Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296, 300 (6th Cir. 1984).

Our analysis of this question has been decisively settled by decisions of the Supreme Court and this Court. In *Watts v. Burkhart*, 854 F.2d 839 (6th Cir. 1988), our Court traced the development of the doctrine of abstention as it applies to pending state administrative proceedings. In *Watts*, a doctor faced a license suspension proceeding before the Tennessee Board of Medical Examiners, a proceeding in which his federal constitutional claims could first be adjudi-

cated only by a state court in review of the decision of the Board. Judge Contie, writing for our Court, concluded that Supreme Court's decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), governs the question:

> Watts contends that he will not be permitted to assert his constitutional claims in the administrative proceedings before the Board. This contention is supported by the record, which shows that after Watts asserts his constitutional claims as affirmative defenses to the Division's motion to summarily suspend his license, the Division successfully brought a motion to strike those defenses on the ground that they were not within the scope of review of proceedings before the Board of Medical Examiners. This fact alone does not, however, establish that Watts will be deprived of an opportunity to present his constitutional claims. In *Dayton Christian Schools*, the Supreme Court stated that "it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding."

Watts, 854 F.2d at 848. The Full quotation from the *Dayton Christian Schools* case is as follows:

> In any event, it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding. Section 4112.06 of Ohio Rev. Code Ann. (1980) provides that any "respondent claiming to be aggrieved by a final order of the commission . . . may obtain judicial review thereof." Dayton cites us to no Ohio authority indicating that this provision does not authorize judicial review of claims that agency action violates the United States Constitution.

477 U.S. at 619.

Finally, we do not agree that the state proceedings which CSXT seeks to have enjoined do not implicate vital state interests. The unsanitary disposal of human waste creates a risk of pollution and disease: preventing such risks is one of

the preeminent functions of the state's police power to protect the health and safety of its residents. A finding of preemption will bar the enforcement of a state law, but it is not a finding that the state has no important interest. Rather it is finding that the federal interest is more important or more vital than the state interest, so that the supremacy clause requires that the federal interest prevail.

The case before us thus involves an ongoing state administrative proceeding that is judicial in nature; it involves a state administrative proceeding from which CSXT may appeal to Michigan state courts to obtain a ruling on its constitutional claim, and it arises in an area in which Michigan has a vital state interest. Every element of abstention is present.

IV.

For all the foregoing reasons, we conclude that the District Court should have abstained. Our holding should not be read as applying a hard and fast rule of abstention in all state administrative matters involving preemption, for as Professor Shapiro has aptly warned:

> The complexity of our federal system—the tension between notions of separateness and interdependence, between the existence and the limits of federal supremacy—makes it impossible to frame a simple rule that will resolve every case. Sometimes these tensions cut in favor of federal action. At other times, they counsel reluctance to pull apart federal and state issues that are not easily separated; to disrupt ongoing state proceedings unless the very prosecution of those proceedings, regardless of their outcome, threatens impairment of federal rights; to take over the management of state institutions; or to assume the inability of state courts to recognize and enforce federal rights.

Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 583 (1985). We find no considerations in this case, however, which would counsel the federal courts to interfere with the ongoing railroad safety proceeding in the Michigan Department of Transportation. Accordingly, the judgment of the District Court is vacated and the case remanded with instructions to dismiss.

APPENDIX C

BEST AVAILABLE COPY

No. 88-1629

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CSXT, INC., a Virginia corporation,
Plaintiff-Appellee,

v.

JAMES J. PITZ, Director of the Department of Transportation of the State of Michigan, *et al.*,
Defendants,

UNITED TRANSPORTATION UNION,
Defendant-Appellant

ORDER

Before: MERRITT, Chief Judge, BOGGS, Circuit Judge, and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

APPENDIX D

BEST AVAILABLE COPY

CXST, INC., a Virginia
Corporation, Plaintiff,

— v.

James J. PITZ, Director of the Department of Transportation of the State of Michigan, Norma J. Fleming, Administrator of the Railroad Safety and Tariffs Division of the Department of Transportation of the State of Michigan, and the Department of Transportation of the State of Michigan, Defendants,

and

The United Transportation Union,
Intervening Defendant.

No. L 88-17 CA 5.

United States District Court,
W.D. Michigan, S.D.

May 13, 1988.

Railway company operating in both Canada and United States sought declaratory judgment that state rule requiring locomotives operating within state to have commodes in them was preempted by federal law. The District Court, Robert Holmes Bell, J., held that both Federal Railroad Safety Act and Locomotive Boiler Inspection Act completely preempted state regulations dealing with locomotives, its boiler, tender, and all parts and appurtenances including state regulation requiring locomotives to have commodes.

Judgment for plaintiff.

Employers' Liability Key 46
States Key 18.45

Both Federal Railroad Safety Act and Locomotive Boiler Inspection Act completely preempted state regulation dealing with a locomotive, its boiler, tender, and all parts and appurtenances thereof, including state regulation requiring locomotives to have commodes; state regulation was within subject matter already contained within federal regulations. Boiler Inspection Act, 45 U.S.C.A § 22 et seq.; Federal Railroad Safety Act of 1970, § 101 et seq., 45 U.S.C.A. § 421 et seq.; U.S.C.A. Const. Art. 6, cl. 2

Patrick E. Hackett, Carol Hackett-Garagiola, Bloomfield Hills, Mich., Sally J. Kircher, Jacksonville, Fla., for plaintiff.

Frank J. Kelley, Atty. Gen., State of Mich. by Susan Peck Iannotti, William Reid Ralls, Lansing, Mich., for defendants.

OPINION

ROBERT HOLMES BELL, District Judge.

Before this Court is plaintiff's motion for summary judgment on its complaint. In its complaint plaintiff seeks a judgment declaring that the Michigan Department of Transportation (MDOT) Rule 460.1473(a) is preempted by the Locomotive Boiler Inspection Act (LBIA), 45 U.S.C. § 22 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.* and an injunction prohibiting defendant MDOT from enforcing Rule 460.1473(a) against CSXT.

BACKGROUND

CSXT is a railway company operating in Canada and twenty states including Michigan. United Transportation Union (UTU), intervening defendant, represents railroad workers and complained to MDOT that CSXT violated Rule

460.1473(a) by failing to provide commodes on locomotives operating in Michigan. MDOT scheduled a hearing on the complaint before an administrative law judge for February 10, 1988. On January 23, 1988, CSXT filed this lawsuit for declaratory and injunctive relief. On January 27, 1988, an MDOT administrative law judge denied CSXT's motion to stay state administrative proceedings pending this Court's determination of CSXT's claims that Rule 460.1473(a) was preempted. On February 8, 1988, this Court granted CSXT's motion for a preliminary injunction restraining defendants from enforcing Rule 460.1473(a) until August 4, 1988, or until this Court's ruling on CSXT's motion for summary judgment.

Of CSXT's 3,000 locomotives approximately 1,000 do not have commodes. Some unequipped locomotives operate in Michigan. However, CSXT indicates that it plans to equip all of its locomotives with commodes within three years.

The disputed rule textually requires "adequate toilet facilities," but does not specifically require equipping each locomotive with an individual commode. Nevertheless, MDOT has argued its position assuming that enforcement of Rule 460.1473(a) would require equipping locomotives with commodes. The administrative law judge's analysis presumes the same. Although UTU does not concur with MDOT that the rule requires a commode on every locomotive, for purposes of its preemption analysis this Court assumes that application of the rule would require installation of a commode on each CSXT locomotive operating in Michigan. Rule 460.1473(a) provides:

> Running Facilities
> Rule 3. (1) Adequate toilet facilities shall be made available for trainmen, enginemen and yardmen, after hearing thereon and order by the commission, which toilet facilities shall be kept in reasonably clean and sanitary condition.

ANALYSIS

The issue before this Court is whether Rule 460.1473(a) is preempted by the Boiler Inspection Act (LBIA), 45 U.S.C. § 22 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.*

The doctrine of preemption is based upon the supremacy clause of the Constitution, art. VI, cl. 2, which mandates that federal law overrides any conflicting state regulation. Moreover, when exercising one of its plenary powers, Congress can occupy an entire regulable field with federal law and effectively prohibit any parallel state legislation. *Missouri-Pacific Railroad Company v. Porter*, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672 (1927). Congress can clearly manifest its intention to preempt state law by explicitly stating its intent to totally occupy a field. Or in lieu of any clear manifestation courts will discern the clarity of Congress' intent to preempt state regulation by the pervasiveness of the federal regulatory scheme, the need for national uniformity, or the potential for conflict between administering federal and state programs. *Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956).

Locomotive Boiler Inspection Act

CSXT argues that the LBIA preempts Rule 460.1473(a) because in the LBIA Congress intended to occupy the entire field of locomotive equipment regulation as determined by the Supreme Court in *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926). Defendants and amicus respond that *Napier* is no longer good law because the FRSA has impliedly superseded the LBIA.

The LBIA, 45 U.S.C. § 23, provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive,

its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may prescribed in the rules and regulations hereinafter provided for.

In *Napier* the Court held that LBIA preempted a Georgia state statute requiring automatic doors on locomotive fireboxes and a Wisconsin statute requiring locomotive cab curtains. The Court recognized that the LBIA comprehensively empowered the Interstate Commerce Commission [authority now resident with the Secretary of Transportation and the Federal Railroad Administration, 49 U.S.C.App. §§ 103 and 1655(e)(1)(E)] to promulgate regulations regarding material, construction, and design of locomotives and all their appurtenances in order to enforce compliance with the LBIA. *Napier*, at 609, 47 S.Ct. at 208. The Court also noted that no federal regulation existed as to the specific items, fire-box doors and cab curtains, that the state regulation required. However, the Court determined that Congress intended the LBIA to occupy the entire field of locomotive equipment and consequently the LBIA preempted the state legislation, *Napier*, at 612-613, 47 S.Ct. at 209-10.

Even though *Napier* was decided in 1926, contemporary federal courts continue to accept it as binding precedent recognizing that Congress intended that the LBIA would occupy totally the field of locomotive equipment and preempt any state regulation of it. Further, this Court is unaware of any federal court authority overruling *Napier*. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983), *Missouri Pacific Railroad Co. v. Railroad Commis-*

sion of Texas, 833 F.2d 570 (5th Cir.1987), *Consolidated Rail Corp. v. Pennsylvania Public Utility*, 536 F.Supp. 653 (E.D.Pa.1982), *aff'd mem.*, 696 F.2d 981 (3rd Cir.1982), *aff'd mem.*, 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983). Moreover, the various authorities proffered by defendants are neither binding precedent on this Court nor reasonably persuasive.

This Court is similarly convinced that in the LBIA Congress clearly manifested its intent to fully occupy the field of locomotive equipment regulation by employing language providing for "rules and regulations" covering a "locomotive, its boiler, tender, and all parts and appurtenances thereof."

Defendants contend that the FRSA, passed subsequently to the LBIA, indicates an unambiguous change in Congress' alleged intent to occupy the field of locomotive equipment regulation. Defendants refer to the legislative history of the FRSA identifying its primary purpose to "promote safety in all areas of railroad operations" and calling "for broadscale Federal legislation with provisions for active State participation to assure a much higher degree of railroad safety in the years ahead." H.R.Rep. No. 1194, 91st Cong., 2d Sess. 19-20 (1970), *reprinted in* 1970 U.S.Code Cong. & Admin.News 4104-4105. (Report 1194, with cites to USSCAN).

CSXT, however, notes that Report 1194, at 4113-4114, underscores the continuing effect of existing federal railroad safety law when commenting on § 202 of the FRSA:

> The committee added the words "supplementing provisions of law and regulations in effect on the date of enactment of this title" to the Secretary's rulemaking authority to make clear that this grant of jurisdiction does not replace the existing rail safety statutes and implementing regulations transferred to the Department of Transportation. . . . It is the committee's intent that those existing statutes will continue to be enforced and administered by the Department in their respective area and that

> the new authority will be implemented with respect to those areas of rail safety not now subject to Federal jurisdiction. In other words, it is the intent of the committee that the existing statutes continue to be administered and enforced as if this legislation had not been enacted.

Since the LBIA was in effect on the date of the FRSA's enactment, this legislative history indicates that Congress did not intend that the FRSA would supersede the LBIA.

This Court acknowledges that in the LBIA Congress intended to occupy the field of locomotive equipment regulation, as recognized in *Napier*, and determines that the FRSA did not impliedly modify the LBIA. Consequently, this Court determines that the LBIA preempts Rule 460.1473(a) insofar as it may be construed to require commodes on locomotives operating in Michigan.

Federal Railroad Safety Act

CSXT claims that the FRSA preempts Rule 460.1473(a) because the rule attempts to regulate the same subject matter as the FRSA, does not qualify under the FRSA's provision for limited state regulation. Defendants and amicus argue that the FRSA specifically provides for state regulation such as Rule 460.1472(a).

The FRSA, § 205, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not

incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

This Court recognizes that Congress prefaces this section with its policy declaration that railroad safety laws "shall be nationally uniform to the extent practicable." This Court further notes that Congress provides for individual state regulations relating to railroad safety until a federal regulation is promulgated covering the "subject matter" of the state regulation. CSXT asserts that "subject matter" should be construed as regulable categories, such as, locomotive equipment. Defendants and amicus maintain that "subject matter" should be narrowly construed to mean particular and specific items, such as, sanitary facilities on locomotives. The pivotal issue is the scope of the phrase "subject matter."

This Court acknowledges Congress' explicit statement that railroad safety laws should be as nationally uniform as practicable. This reasonably suggests that the "subject matter" under state regulation should be circumscribed and distinct from the "subject matter" under federal regulation. Nevertheless, Congress does provide for additional or more stringent state regulation of a federally regulated "subject matter" in order to eliminate or reduce an "essentially local safety hazard." But that is not the present case as the parties themselves recognize.

Congress' mandate of national uniformity also logically implies a broad construction of the term "subject matter" as a category, class, or group, rather than a specific, particular, or individual item. If "subject matter" were construed narrowly as item specific, then states would be free to interstitially impose a myriad of gap filling safety regulations in areas where Congress may have regulated comprehensively, although not exhaustively. This approach would promote piecemeal, ad hoc, and fragmentary regulation, and, thereby, effectively destroy national uniformity.

This Court acknowledges and endorses the rationale of *Norfolk and Western Ry. Co. v. Burns*, 587 F.Supp. 161 (E.D.Mich. 1984). In *Burns* the court determined that the FRSA preempted state regulation of railroad walkways because walkways comprised an unspecified part of the general track structure, which was a federally regulated "subject matter." The *Burns* court recognized the potential "subject matter" conflict arising from Congress' intent to provide uniform railway safety regulations and the states' limited right to regulate for safety:

> To the degree that this pronouncement suggests federal preemption, it is equally important to note that the matter of permissible state regulation is specifically addressed. First, it is clear that there can be no preemption unless the Secretary has actually adopted a railroad safety standard. *That does not necessarily mean that the standard adopted must detail every conceivable item that might be contemplated thereby;* but, at least, there has to be some action generally indicating that the Secretary is acting pursuant to the powers vested in him by Congress. (emphasis added)

Burns, at 164.

In the instant case, federal regulations exist comprehensively governing locomotive design and equipment. Railroad locomotive safety standards are extensively specified in 49 C.F.R. §§ 229.1-229.141 (1987) detailing numerous individual items of locomotive equipment. This Court recognizes the expansive range and comprehensive scope of these safety standards for locomotive design and equipment. This Court also acknowledges that locomotive commodes do not appear as specific regulated items. Nevertheless, this Court determines that the phrase, "subject matter," is most reasonably construed broadly as a category, group, or class because of the comprehensive scope and character of existing federal locomotive safety regulations. Even though these comprehensive federal regulations do not exhaustively "detail every

conceivable item that might be contemplated," they, in fact, define a category of "subject matter" by their scope and range of which this Court determines that locomotive commodes are part and parcel. Therefore, the existing comprehensive federal regulation of locomotive equipment, which this Court recognizes as constituting a category, class, group, or field of "subject matter" under the FRSA, § 205, preempts state regulation requiring locomotive commodes.

CONCLUSION

Accordingly, this Court determines that the LBIA and the FRSA each preempt Rule 460.1473(a) insofar as it is construed to require commodes on locomotives operating in Michigan.

APPENDIX E

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E. RELEVANT SECTIONS
MICHIGAN ADMINISTRATIVE PROCEDURES ACT

CHAPTER 4. PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec.71.(1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

* * *

24.272 Defaults; written answers; evidence; arguments; cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

History: 1969, Act 306, Eff. July 1, 1970.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

History: 1969, Act 306, Eff. July 1, 1970;-AM. 1970, Act 40, Imd. Eff. July 1, 1970.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74.(1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

History: 1969, Act 306, Eff. July 1, 1970.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

* * *

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

History: 1969, Act 306, Eff. July 1, 1970.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or

its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.278 Stipulations; disposition of cases, methods.

Sec. 78.(1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1,1970.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.280 Presiding officer; powers and duties; "nonmeeting day" defined

Sec. 80.(1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested

case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970;-Am. 1984, Act 28, Imd. Eff. March 1, 1984;-Am. 1984, Act 196, Imd. Eff. July 3, 1984.

24.281 Proposals for decision; contents.

Sec. 81.(1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make finding of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or thepublic service commission insofar as the case involves rate-making or financial practices or conditions.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.285 Final decisions and orders.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact which would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof objections and ruling thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

History: 1969, Act 306, Eff. July 1, 1970;-Am. 1970, Act 40, Imd. Eff. July 1, 1970.

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